



July 24, 2002

Mr. Steve Aragón  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2002-4066

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166128.

The Texas Health and Human Services Commission (the "commission") received a request for "a copy of the bid proposal submitted by EDS, and a copy of the signed contract for the Medicaid Fraud and Abuse Detection System." You inform us that the commission will provide the requestor with a copy of the request for offers and the final contract along with the memorandum of revised terms incorporated therein. At issue in this ruling is the bid proposal submitted by EDS. Although you raise no exception to disclosure of this information on behalf of the commission, you have notified EDS pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). EDS claims that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. We have considered the exception claimed and reviewed the submitted information.

As a threshold issue, we address EDS's reliance on a confidentiality statement contained in each volume of the proposal. Information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the proposal must fall within an exception to disclosure in order to be

withheld from disclosure. Therefore, we will consider the exceptions EDS claims.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*<sup>1</sup> This office has held that if a

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<sup>1</sup> The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

EDS argues that specified portions of its proposal are excepted from disclosure under both components of section 552.110. Having considered EDS's arguments and reviewed the submitted information, we conclude that EDS has made a *prima facie* case under section 552.110(a) for much of the information in its proposal. As we have received no arguments to rebut this claim, we conclude that the commission must withhold the following portions of EDS's proposal under section 552.110(a): Volume I, section 3.2, pages 3-7 through 3-9; Volume I, section 3.3, pages 3-10 through 3-13; Volume I, sections 3.4 through 3.6, pages 3-14 through 3-23; Volume I, section 4.2.1.2, pages 4-11 through 4-18; Volume I, section 4.4.1, pages 4-44 through 4-47; Volume I, section 4.4.2, pages 4-47 through 4-49; Volume I, section 4.4.4, pages 4-52 through 4-54; Volume I, sections 6.1 and 6.2, pages 6-3 through 6-6; Volume I, section 9, pages 9-1 through 9-18 and workplan; Volume II, section 2, pages 2-2 through 2-40; Volume III, section 4, pages 4-1 through 4-15; and Volume III, section 5, pages 5-1 through 5-145. We conclude, however, that EDS has failed to demonstrate the applicability of section 552.110(b) to the remaining information that it seeks to withhold from its proposal. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see generally* Freedom of Information Act Guide & Privacy Act Overview 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government); Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978). Accordingly, pursuant to section 552.110(a), the commission must withhold only those portions of EDS's proposal that we have marked.

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Restatement of Torts, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We note, however, that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Finally, we note that the submitted information contains e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Section 552.137 requires the commission to withhold e-mail addresses of members of the public that have been provided for the purpose of communicating electronically with the commission, unless the members of the public have affirmatively consented to their release. As there is no indication that the members of the public whose e-mail addresses are at issue have consented to their release, pursuant to section 552.137 of the Government Code, the commission must withhold from disclosure the e-mail addresses we have marked.

In summary, the commission must withhold from disclosure the information we have marked in EDS's proposal. The remainder of the proposal must be released, subject to copyright laws where applicable.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

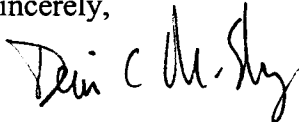
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" and last name "McElroy" clearly distinguishable.

Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 166128

Enc. Submitted documents

c: Ms. Leann A. Horn  
Legal Assistant  
Loeffler Jonas & Tugget, L.L.P.  
1005 Congress Avenue, Suite 330  
Austin, Texas 78701

Ms. Carol D. Meisel  
Client Delivery Manager  
EDS  
13545 Riata Vista Circle  
Austin, Texas 78727  
(w/o enclosures)